1982

Bonneville Properties, Inc. v. Dan Simons : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

BONNEVILLE PROPERTIES, INCORPORATED, a corporation,

Plaintiff-Respondent,

vs.

DAN SIMONS,

Defendant-Appellant.

No. 18223

BRIEF OF APPELLANT

Appeal from the Judgment of the
Third Judicial District Court, Salt Lake County
Honorable Homer F. Wilkinson

PARKER M. NIELSON
MARY LOU GODBE
318 Kearns Building
Salt Lake City, Utah 84101

Attorneys for Appellant

DENNIS K. POOLE
POOLE, CANNON & WARD
4885 South 900 East
Suite 210
Salt Lake City, Utah 84117

Attorneys for Respondent

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4885 South 900 East
Suite 210
Salt Lake City, Utah 84117

Attorneys for Respondent

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STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiff-appellee, Bonneville Properties, Inc. ("Bonneville"), for breach of contract and unjust enrichment against defendant-appellant, Dan Simons ("Simons"), over the amount of a real estate commission allegedly earned by virtue of a unilateral contract of sub-agency.

DISPOSITION OF THE LOWER COURT

Judgment was entered on December 22, 1981, by the Honorable Homer F. Wilkinson, District Judge, in favor of Bonneville and against Simons in the sum of $11,000.00, together with prejudgment interest in the sum of $3,703.23, calculated at the rate of six percent per annum, and costs of $222.60, following a trial to the court. The judgment was based upon an offer of a unilateral contract of subagency arising through the advertisement by Simons, a listing agent, of his listing agreement with the Salt Lake Board of Realtors Multiple Listing Service. (Findings of Fact numbers 6 through 8). The trial court held, inter alia, that Simons could not revoke or change the offer of subagency after Bonneville initiated action on the unilateral offer, without regard for whether a ready, willing and able purchaser on the terms specified in the offer had actually been produced. (Findings

of Fact numbers 5, 15, 20 through 23; Conclusions of Law number 5).

RELIEF SOUGHT ON APPEAL

Simons respectfully requests this court to reverse the lower court's judgment for the reasons that (1) it is unsupported by the facts, and (2) it is incorrect as a matter of law.

STATEMENT OF FACTS

The basic facts, most of which were stipulated by the parties, are as follows:

Essentially, this appeal involves a listing agreement of Simons' published by the Salt Lake Board of Realtors Multiple Listing Service concerning a warehouse located at 2350 South 2300 West, Salt Lake City, Utah, known as Fashion Fabrics. On January 2, 1975, Simons changed his commission split, reducing the share of the commission payable to the selling broker from 60 percent to 40 percent. The change was published and effective on January 10, 1975. The property was sold pursuant to contingent documents dated February 3, 1975, which closed at some point between March 15 and April 15, 1975, and Bonneville was paid 40 percent of the commission as per the published commission split in effect at that date. (Tr. 3-4, Ex. 6).

Bonneville is a Utah corporation. L. Richard Sorensen ("Sorensen") is the controlling shareholder and chief executive officer of Bonneville, is a licensed real estate broker and does business as "Bonneville Properties." At the times material to this action Dennis Christensen ("Christensen") worked with Bonneville as a licensed real estate agent. By the terms of his agreement, any commissions due Sorensen or Bonneville on sales generated by Christensen would be divided fifty-fifty between them after deducting ten percent for expenses. (Tr. 5).

Simons is a licensed real estate broker doing business at the material time as Real Estate Consultants. Simons has been a licensed real estate agent since 1959 and a licensed real estate broker since 1968. He has extensive experience in the highly specialized commercial and industrial aspect of the real estate business and has served his profession in numerous capacities, having been for example, Regional Vice President of the National Association of Realtors, Rocky Mountain Region, 1981-82; President of Utah Association of Realtors, 1979-80; and President of Salt Lake Board of Realtors, 1974-75. (Tr. 5-6).

On or about September 25, 1974, Simons entered into an exclusive listing agreement with Fashion Fabrics, Inc. for the sale of the Fashion Fabrics Warehouse located at 2350 South 2300 West, Salt Lake City, Utah. (Tr. 6) (Ex. 3).

Simons advertised the property for sale through the Salt Lake Board of Realtors Multiple Listing Service. (Ex. 1). The Multiple Listing Service, for purposes of this suit, was an arrangement whereby member brokers extended an open, unilateral offer of subagency, for a stipulated commission split, to other member brokers with respect to properties listed with the offering broker. Otherwise, the terms of the offer were at least in part defined by the rules of the Multiple Listing Service. Simons and Sorensen were both members of the Multiple Listing Service. (Tr. 6).

When the Fashion Fabrics property was first advertised through the Multiple Listing Service, Simons' published commission split with the Salt Lake Board of Realtors was sixty percent to the selling broker and forty percent to the listing broker. On or about January 2, 1975, Simons wrote a letter to the Salt Lake Board of Realtors changing his commission split to sixty percent to the listing broker and forty percent to the selling broker. This notice of change of commission split was effective on January 10, 1975, when it was published in the January 10, 1975, Multiple Listing Service book. (Tr. 6-7).

The rules of the Salt Lake Board of Realtors Multiple Listing Service in effect at the material time, which at least in part constituted terms of any unilateral contract reached, stipulated that a commission split must

remain in effect for at least twenty days but could be changed thereafter at any time by giving written notice to the Board, effective when published in the next Multiple Listing Service book. When Simons changed his commission split, no written offer had been submitted or reached by the eventual purchaser of the Fashion Fabrics warehouse which was an essential ingredient of the eventual sale. (Finding of Fact number 16; Tr. 7-8).

In mid-1974, the Adnan and Essam Kashoggi families became interested in developing what is now the Salt Lake International Center. In August, 1974, the Kashoggi families formed a Utah corporation known as A. K. Utah Properties, Inc., d/b/a the Salt Lake International Center, for the purpose of acquiring the property upon which the center was to be located and proceeding with the development. (Tr. 8-9).

Prior to the formation of A. K. Utah Properties, Inc. most of the International Center property was owned by Jelco, Inc., a Utah corporation, but a part of one section necessary for the development was owned by the Robert B. Swaner Company ("Swaner"). Shortly after its formation in August, 1974, A. K. Utah acquired the majority of Jelco's interest in the International Center property, (Tr. 9) leaving the Swaner property as the remaining essential acquisition.

On or about September 25, 1974, A. K. Utah entered into an exchange agreement with Swaner whereby it was agreed

that Swaner would convey its interest in the International Center property to A. K. Utah, Swaner would locate other property satisfactory to it, and A. K. Utah would purchase that property and make a tax free exchange of such property for Swaner's interest in the International Center property.

A. K. Utah's exchange agreement with the Swaner company was eventually performed as modified at some time between mid-March and mid-April, 1975, pursuant to contingent documents dated February 3, 1975, by A. K. Utah's purchase of Fashion Fabric's interest in a building located at 2350 South 2300 West, Salt Lake City, Utah, and the contemporaneous exchange of that interest for Swaner's interest in the International Center property. Neither A. K. Utah nor Jelco, Inc. was ever at any time interested in purchasing the Fashion Fabrics property for its own account. A. K. Utah's only interest in the property was the possible satisfaction of its exchange agreement with the Robert B. Swaner Company. It is the consummation of that exchange transaction and the attendant sale of the Fashion Fabrics warehouse out of which the instant controversy between Bonneville and Simons arises. (Tr. 9-10).

In early December, 1974, Bonneville's agent met with a representative of Jelco, Inc. with regard to the possibility that the Fashion Fabrics property might be used to perform the Swaner exchange agreement. (Tr. 9).

The Executive Vice-President of A. K. Utah, Mr. Emanual A. Floor, testified that he was in charge of and had "all the authority" with respect to the Fashion Fabrics-Swaner arrangement. Mr. Floor further testified that Jelco, Inc. had no authority to represent A. K. Utah and that neither Bonneville, Sorensen or Christensen were ever retained to represent A. K. Utah on the transaction. (Tr. 231-233) Mr. Floor's testimony is uncontroverted.

It is clear and uncontroverted, therefore, that Bonneville represented no one in the transaction. It is also clear that Bonneville did nothing in the negotiations leading up to the sale. Bonneville's claim is based upon the sole fact that it introduced the idea for the Fashion Fabrics transaction to Simons. The trial court so concluded at Finding of Fact paragraph 11 and Conclusion of Law number 5.

The uncontroverted testimony of Mr. Floor was that prior to January 27, 1975, Jelco, Inc., or its representative, was demanding payment to it of a "special fee" of $100,000.00, which was not acceptable to either party to the transaction. The trial court concluded at Conclusion of Law number 25 that it was only after that requirement had been dropped that there was any final agreement acceptable to either A. K. Utah (Tr. 237-239, 241), or Fashion Fabrics (Tr. 149-52).

Upon sale of the Fashion Fabrics warehouse a payment became due Simons and other brokers by the seller, Fashion

Fabrics, in the aggregate amount of $125,000.00. Of this sum, $25,000.00 was owed and paid to Simons' referring broker, Jim Shaunessey, and is not at issue in this lawsuit, leaving $100,000.00 due Simons and any other broker entitled to share in the commission. Simon's commission split with other brokers as published through the Salt Lake Board of Realtors at the time contingent documents were executed, February 3, 1975, was sixty percent to the listing broker and forty percent to the selling broker. (Tr. 10-11)

It was agreed by stipulation that Simons in fact believed that he was entitled to sixty percent, or $60,000.00, and Simons agreed that Sorensen should receive forty percent, or $40,000.00, in accordance with the published commission split as of that date. Fashion Fabrics could not afford to pay the commission in a lump sum. Simons, therefore, in order to allow the sale to close and in an effort to help Fashion Fabrics with its cash flow problems, agreed to accept payment of the commission in installments. Simons also agreed to a separate agreement between Fashion Fabrics and Bonneville whereby Bonneville got its share of the commission before Simons got his because Christensen was in financial trouble. Bonneville was paid $40,000.00 in cash. Bonneville paid Christensen $18,000.00. In July, 1975, Fashion Fabrics had run out of money and Simons agreed to and did accept restricted stock in Fashion Fabrics in satisfaction of the remaining

$22,000.00 due him. Fashion Fabrics subsequently went out of business and Simons' stock is valueless. (Tr. 11)

It is important to note that there was no agreement, oral or written, between Bonneville, Sorensen or Christensen and Simons with respect to any commission on the Fashion Fabrics listing, apart from any agreement which might be implied or in fact exist by virtue of the respective brokers' membership in the Salt Lake Board of Realtors, Simons' offer of subagency through the Multiple Listing Service, and custom and usage in the trade. (Tr. 12)

Mr. B. L. Scott, Executive Secretary of the Salt Lake Board of Realtors, testified by way of stipulation, and identified the Rules and Regulations governing operation of the Multiple Listing Service. (Ex. 2) Mr. Scott's stipulated testimony was that at the relevant time, when called upon to arbitrate disputes between brokers regarding commission splits, that the split in effect as of the date of a written and binding offer, if such offer did not vary from the terms of the listing, was determinative. (Tr. 18-19) It is uncontroverted that no written, binding offer was ever submitted until the transaction actually closed on or about March 27, 1975, almost three months after Simons changed his commission split.

On or about June 3, 1976, Dennis Christensen filed suit against Dan Simons in the United States District Court for the District of Utah, Civil No. C 76-174, seeking damages

for alleged violations of the antitrust laws of the United States, alleging a conspiracy to deprive Christensen of his fair share of the real estate commission attributable to the sale of the Fashion Fabrics property by virtue of Simons' change in commission split, and a pendent claim for breach of contract concerning the commission, all of which arose out of the same transaction or occurrence which is the subject of the instant action. Simons and Christensen settled that lawsuit pursuant to an agreement, a copy of which was attached to Simons' trial brief as Exhibit "A", and Christensen executed a general release of all claims in favor of Simons, a copy of which was attached to Simons' trial brief as Exhibit "B". Under the terms of Sorensen's agreement with Christensen in effect when the Fashion Fabrics warehouse was sold, Sorensen would have been obligated to pay Christensen, after deducting ten percent for expenses, fifty percent of any commission due Sorensen on the sale. (Tr. 13-14)

ARGUMENT

POINT I

FUNDAMENTAL UTAH LAW CONCERNING UNILATERAL CONTRACTS OF SUBAGENCY BETWEEN REAL ESTATE BROKERS IS IGNORED

Utah law is clear that a unilateral offer of subagency between real estate brokers may be withdrawn at any time before

it is accepted by producing a written, binding offer from a ready, willing and able purchaser, on the terms specified in the offer. E.g., Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977). The trial court misconceived the law in that regard and applied, instead, the minority rule of some other jurisdictions in general contract cases that substantial performance gives rise to an implied promise not to revoke the original offer. See, RESTATEMENT, CONTRACTS, Section 45, Comment g.

The minority rule of the Restatement has never been adopted in Utah. Even if it were, the facts supporting it are not present in this case. The issue of law here, therefore, is whether the well settled Utah law governing brokerage commissions is to be abandoned in favor of a modified version of the minority position.

A. A Broker's Unilateral Offer Of Subagency May Be Withdrawn Before It Is Accepted by Performance.

In essence, Bonneville claims that its agent, Christensen, introduced Simons to the party which purchased the Fashion Fabrics warehouse (Finding of Fact No. 11, Conclusion of Law No. 5); and that the "introduction of the purchaser's name was significant" (Conclusion of Law No. 5) to the transaction contemplated by Simons' open, unilateral offer of subagency. The necessary conclusion, though unarticulated in the Findings and Conclusions, is that the mere act

of introduction rendered Simons' offer irrevocable and not subject to modification. Such a conclusion is not supported by either the facts or the law.

There was no oral or written agreement between Bonneville and Simons apart from any agreement implied by virtue of their respective membership in the Salt Lake Board of Realtors, the rules of the multiple listing service, and custom and usage in the trade. The uncontroverted testimony was that, under those rules, Simons was entitled to change his commission split (that is, to modify his offer of subagency) effective upon publication in the next multiple listing service book, at any time prior to the delivery of a written, binding offer meeting all terms and conditions of the listing agreement or at any time prior to the execution by buyer and seller of a written, binding agreement to other terms. (Findings of Fact No. 27, stipulated testimony of B. L. "Nick" Scott, Executive Secretary, Salt Lake Board of Realtors). See, Boyer Co. v. Lignell, 567 P.2d 1112 (Utah 1977). Here, Simons' modification was given January 2, 1975, (Finding of Fact No. 15) and effective January 10, 1975. The trial court found it to be a fact, conclusive against the position of Bonneville under existing Utah law, that on the effective date of modification, January 10, 1975, there was no written, binding agreement among the parties to the exchange transaction which was eventually consummated on March 27, 1975. (Finding of Fact No. 16).

Sorensen himself admitted that he had been informed by the Board of Realtors that there was no point in filing a complaint with the Board because Simons' change in his commission split was proper and Sorensen would lose. (Tr. 98-101).

Prior to actual performance, it is of no consequence that Bonneville made efforts to perform, which the trial court considered "significant." As the Utah Court said in E. B. Wicks Co. v. Moyle, 103 Utah 554, 137 P.2d 342 (1943):

> A broker is never entitled to commissions for unsuccessful efforts. The risk of a failure is wholly his. The reward comes only with his success. That is the plain contract and contemplation of the parties. The broker may devote his time and labor, and expend his money with ever so much devotion to the interests of his employer, and yet if he fails, if without effecting an agreement for accomplishing a bargain, he abandons the effort, or his authority is fairly and in good faith terminated, he gains no right to commissions. Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 33 Am Rep. 441.

Performance which will constitute acceptance of the offer of subagency must either be a binding offer embodying all of the terms specified in the listing agreement, or constitute buyer and seller's written, binding agreement to other terms. Boyer, supra. Finding a buyer satisfying most of the terms, or on terms substantially the same, or even finding a buyer who agrees to the same terms at a later date, clearly is not sufficient. E. B. Wicks Co., supra. The correct statement of the proposition on the facts of this case, is at RESTATEMENT 2d., AGENCY § 447:

> An agent whose compensation is conditioned upon his procuring a transaction on specified terms is not entitled to such compensation if, as a result of his efforts a transaction is effected on different or modified terms, although the principal thereby benefits.

The Utah Court adopted this proposition verbatim in E. B. Wicks Co., supra. The facts of the Wicks case, moreover, are dispositive against the position asserted by Bonneville here for in Wicks the broker was held not entitled to a commission even though an agreement was reached with his client at a later date. Appropos the facts herein, where a commission or "bribe" to Jelco had to be eliminated before there was an offer acceptable to the parties (Finding of Fact No. 25) and Simons had to complete complex negotiations, including many with government authorities (Tr. 270-283), the Utah Court, with Justice Wolf concurring separately, held in Wicks that the mere fact that the seller (in that case a lessor) suffered the loss of one months' rental made the performance sufficiently different to preclude entitlement to a commission.

The logic of the foregoing holdings cannot be denied. Simons' initial published listing was stipulated to be 60% "to the selling broker." (emphasis added). No offer was ever made for a mere "finder." When it became obvious that Simons would himself have to perform the services his offer contemplated (see testimony of Simons at Tr. 220-283) concerning the services performed and expenses incurred) it was not only fair, but necessary, for him to change the commission split to

reflect the reality of the transaction as it developed. That he nevertheless agreed to pay 40% to Bonneville, which had done nothing, was in reality an act of generosity, for Bonneville plainly was not the "selling broker."

If it were the law that the offering agent could not revoke or modify an offer of subagency, even to another broker who had undertaken efforts to perform, the result would be sheer chaos. The uncontroverted testimony in this case is that Simons was entertaining offers from a large number of other brokers simultaneously with the A. K. Utah-Swaner negotiations. (Tr. 265-268). If Bonneville were held entitled to complete performance on the offer in effect prior to January 10, 1975, merely because it had devoted efforts prior to that date, then why not each of the other agents for the many other prospective purchasers with whom Simons and Fashion Fabrics were negotiating at the time? The result might mean that an offering broker could incur obligations to any number of performing subagents, possibly after the property was already sold. It would, moreover, be plainly unfair to prohibit brokers from changing their commission splits when the magnitude of time and expense devoted to a particular listing made it unreasonable, uneconomical and unfair to continue to offer a more advantageous split with other brokers who had not yet produced the only thing that counts--that being a sale. The very operation of the real estate industry would be impossible if confined by such

rigid strictures.

B. The Findings By The Trial Court Conclusively Deny Any Acceptance Of The Offer.

The Findings of Fact and Conclusions of Law establish that when Simons modified his offer of subagency with respect to the commission split by letter of January 2, 1975, effective January 10, 1975, neither Bonneville nor anyone else had produced a written binding offer from a buyer ready, willing and able to purchase on the terms listed, as required by the foregoing authorities. Indeed, there could be no "ready, willing and able buyer" until A. K. Utah and Swaner reached a binding contract for satisfaction of the Swaner exchange agreement (Finding of Fact No. 21), which event did not occur until the transaction actually closed on March 27, 1975. (Finding of Fact No. 28). Prior to that time, any talk about the Fashion Fabrics building was precisely that--just talk.

Indeed, the Findings of Fact and Conclusions of Law entered by the trial court are conclusive that there could not have been a valid acceptance before the commission split was changed. The trial court's finding that negotiations broke down "during a period that Jelco, Inc. made persistent demands for an additional commission of $100,000.00" [characterized by Stan Shaw as a "bribe"] (Finding of Fact No. 25) is conclusive against the position of Bonneville under both Utah law and the minority rule of the Restatement.

The terms on which the Fashion Fabrics warehouse were sold, moreover differed significantly from those set forth in the listing agreement. (Tr. 278-83)

Moreover, Bonneville was not the "selling broker" in any sense. The trial court determined as a fact (and, indeed, Bonneville did not dispute) that neither Bonneville, Sorensen or Christensen "represented A. K. Utah as realtors at any time." (Finding of Fact No. 11). Bonneville had no client and Bonneville's agent did not even show the subject property to the purchaser. Bonneville did not represent the Robert B. Swaner Company. That entity was represented by Bernard Fallentine of Tracy Realty who first showed Swaner the Fashion Fabrics warehouse and who conducted some of the negotiations concerning the proposed exchange on behalf of Swaner. (Tr. 185-190). Plaintiff did not represent Fashion Fabrics--Simons performed that role.

The only thing that Bonneville did do was have an idea (one, it should be noted, that Fallentine had already had and pursued) (Tr. 130) and contact Jelco and Simons pursuant to that idea. (See Conclusion of Law No. 5).

The proposal being urged by Jelco with respect to sale of the warehouse was, moreover, an entirely different deal than that eventually consummated by Fashion Fabrics, A. K. Utah and Swaner because of Jelco's persistent demand of an additional $100,000.00. The transaction was never consummated until the parties to the transaction were clear that Jelco and its demand

for the extra $100,000.00 were completely out of the picture--which also occurred long after Simons changed his commission split.

C. Simons' Change In The Commission Split Was In Good Faith.

The controlling holding of this Court in E. B. Wicks Co. v. Moyle, supra, does recognize that one who terminates a unilateral offer (in this case, an offer of subagency) must do so "fairly and in good faith." Even on that score the facts are conclusive against the position of Bonneville, however, for the parties stipulated that "Simons believed, therefore, that he was entitled to sixty percent" (Tr. 11) and the trial court determined "that the Defendant Simons in changing his commission split as set forth in his letter of January 2, 1975, did so, acting in good faith." (Emphasis added) (Finding of Fact No. 15).

> "THE COURT: Well, is there any dispute that he did that in good faith? I have no reason [to believe] he didn't do it in good faith." (Tr. 224)

Indeed, the trial court excluded all evidence offered by Simons going to the question of his good faith, such as the extraordinary amount of time Simons had devoted to the matter, the $20,000.00 in expenses he had incurred, and the extent of his negotiations with brokers other than Bonneville, on the grounds that such evidence was immaterial, there being no question that Simons had changed his split in good faith. (Tr. 224)

POINT II

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION FOR LEAVE TO AMEND ITS ANSWER OR AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE

The defendant's answer to the amended complaint, dated December 10, 1975, was prepared and signed by Ellen M. Maycock, Esq., who was acting as counsel for defendant at that time. Ms. Maycock withdrew as counsel for defendant on March 6, 1980. At that point counsel herein, who had formerly been shown on the pleadings but had no active role, assumed responsibility for the litigation. Six days prior to trial counsel for defendant noticed a manifest factual error in the answer filed by defendant's former counsel--specifically, an admission that Bonneville had introduced Simons to the party who purchased the Fashion Fabrics warehouse. The facts, never disputed by the parties, were that Bonneville had introduced Simons to Jelco, Inc. (not the purchaser) and that Jelco, Inc., in turn, had introduced Simons to the eventual purchaser, A. K. Utah.

Counsel for defendant immediately telephoned counsel for plaintiff, advised him of the manifest error and asked that he stipulate for leave to amend. He refused. The following day, five days before trial, counsel for Simons prepared, filed and hand delivered to Bonneville's counsel a motion for leave to amend the answer. (See defendant's motion for leave to amend, dated August 26, 1981).

The motion was argued to the Honorable Homer F. Wilkinson prior to trial, on August 31, 1981. (Tr. 28-40) In opposing the motion counsel for plaintiff argued in essence that granting the motion would prejudice plaintiff by depriving it of the ability to adduce evidence concerning any agency relationship that may have existed between A. K. Utah and Jelco. Specifically, plaintiff's counsel argued that when Bonneville's agents introduced Simons to Jelco, the Jelco employee attending that meeting, one Gary Jenkins, had stated that Jelco represented A. K. Utah. At the time of trial Jenkins was no longer with Jelco, resided in Phoenix, Arizona, and had not been deposed by either party. Counsel for plaintiff, therefore, claimed he would be prejudiced by his inability to adduce testimony concerning Gary Jenkins' statement, which was plain hearsay in any event.

Counsel for Simons then offered to stipulate that Mr. Jenkins would so testify if called, but counsel for plaintiff declined to accept that stipulation. Counsel for Simons also pointed out that A. K. Utah's executive vice president, Emanuel A. Floor, was under subpoena by both parties and was available to testify concerning what, if any, relationship existed between A. K. Utah and Jelco with respect to the Fashion Fabrics transaction.

The court refused to continue the trial and denied leave to amend. (Tr. 37,40)

At trial all evidence adduced by both parties established the facts as recited in defendant's motion for leave to amend, that is, that Bonneville introduced Simons to Jelco and that Jelco subsequently introduced Simons to A. K. Utah. No evidence was offered on the question of what, if any relationship existed between A. K. Utah and Jelco before January 1, 1975, but the uncontroverted evidence conclusively established that from and after January 1, 1975, there was no agency relationship whatsoever between A. K. Utah and Jelco.

At the conclusion of trial counsel for Simons moved the court, again, for an order amending the pleadings to conform to the evidence. The court denied that motion, despite the clear mandate of Rule 15, Utah Rules of Civil Procedure. The court then entered Findings of Fact numbers 11 and 12:

> "11. That Plaintiff, by and through its agents, L. Richard Sorensen and Dennis Christensen, met with the Defendant Simons in December, 1974, at the offices of Gary Jenkins, and that at such meeting and at such time disclosed to Defendant Simons that A. K. Utah Properties was a prospective purchaser of the Fashion Fabrics Warehouse, but that neither Plaintiff nor its agents, L. Richard Sorensen and Dennis Christensen, represented A. K. Utah as realtors at any time."
>
> 12. That the Plaintiff's agent, as admitted in the Defendant's pleadings, introduced to the Defendant the party who purchased the Fashion Fabrics Warehouse, and the Plaintiff, through its agent or agents, introduced to the Defendant the name of A. K. Utah as a prospective purchaser, such introduction occurring at a meeting in the offices

of Jelco, Inc. Plaintiff never personally introduced A. K. Utah to Defendant."

The finding that plaintiff introduced defendant Simons to the party who purchased the warehouse is not supported by an iota of evidence. It is, rather, based solely on the erroneous admission set forth in paragraph 6 of defendant's answer. Moreover, the court's other findings with respect to Bonneville's relationship to the transaction are completely inconsistent with the conclusion that Bonneville introduced Simons to the purchasers. The court found that "neither Plaintiff nor its agents, L. Richard Sorensen and Dennis Christensen, represented A. K. Utah as realtors at any time" (Findings of Fact No. 11) and that plaintiff never personally introduced defendant to A. K. Utah and that all plaintiff did was introduce Simons "to the name of A. K. Utah as a prospective purchaser." (Findings of Fact No. 12) (emphasis added). It is patently inconsistent with interests of justice and grossly unfair to bind the defendant Simons to a manifest error concerning a fact which was never in dispute and which was contained in a pleading he did not prepare and did not sign.

Utah law, and indeed, the law in every jurisdiction, is that failure to permit leave to amend to correct such a manifest error, or to conform to the evidence, is an abuse of discretion. Rule 15(a), Utah Rules of Civil Procedure, so provides. Gillman v. Hansen, 26 Utah 2d. 165, 486 P.2d 1045 (1971); cf. Murphy v. Ganey, 23 Utah 633, 66 Pac. 190 (1901). See, also, First

Security Bank of Utah v. Colonial Ford, Inc., 597 P.2d 859 (Utah 1979).

POINT III

THE JUDGMENT SHOULD BE REVERSED TO CORRECT MANIFEST ERRORS OF LAW AND PROCEDURE

The trial court committed numerous other errors requiring reversal, as follows:

A. Subject Matter Jurisdiction Was Lacking.

At the commencement of trial counsel moved to dismiss for the reason that Bonneville lacked statutory authority to maintain this action. In that regard, Utah Code Annotated, Section 61-2-18 provides:

> No person, partnership, association or corporation shall bring or maintain an action in any court of this state for the recovery of commission, a fee, or compensation for any act done or service rendered . . . unless such person is duly licensed hereunder as a real estate broker. . . .

The evidence is clear and uncontroverted that Bonneville is not so licensed. Mr. Steven Francis, the director of the Real Estate Division of the State of Utah, so indicated by affidavit (Tr. 40) and further testified to that effect. (Tr. 209) This Court has given literal effect to the prohibitions of the statute. Diversified General Corporation v. White Barn Golf Course, Inc., 584 P.2d 848 (Utah 1978); Chase v. Morgan, 339 P.2d 1018 (Utah 1959); Young v. Buchanan, 259 P.2d 976 (Utah 1953).

B. Denial Of Proferred Proof On Custom And Usage Was An Abuse Of Discretion.

It was stipulated between the parties that Bonneville's claim that a contract for sixty percent of the commission existed could derive only from "the parties' membership in the multiple listing service, the rules thereof, and custom and usage in the trade." (Tr. 12) Yet, when Simons proferred proof of the trade's custom and usage to rebut Bonneville's claim of contract, it was excluded by the trial court. (Tr. 283-291) In so doing the trial court abused its discretion and committed reversible error.

C. Award Of Pre-Judgment Interest Was Error.

Damages awarded by the trial court included pre-judgment interest in the sum of $3,703.23. We know of no authority for such an award.

D. Any Claim Of Bonneville Has Been Waived.

It is clear on the stipulated facts that any claim of Bonneville is necessarily based upon its agent, Christensen, suggesting an "idea" to Simons. Yet, Christensen brought suit on that very claim in the federal courts and compromised his claim with Simons. (Tr. 13) It is familiar that the related rules of res judicata, collateral estoppel, waiver and release are for the "purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his

privy," Parklane Hosiery Company, Inc. v. Shore, 439 U.S. 322, 326 (1979). The rule should bar the claim asserted herein.

CONCLUSION

The conclusion reached by the trial court is a novel approach to unilateral contracts in the real estate industry, never adopted by this or any other jurisdiction. Under the trial court's holding once a broker communicates an "idea" that is "significant" to an eventual sale transaction, the listing broker may not modify his unilateral offer of sub-agency. The listing broker may not do so, even if the broker having the "idea" represents no one, produces no purchaser and does not even perform services which are "substantial" as required by the minority rule.

Unless this Court is prepared to abandon its well settled requirement of producing a "ready, willing and able buyer" on the "terms of the offer" for the innovative rule adopted by the trial court, this case must be reversed.

Respectfully submitted this 9th day of September, 1982.

PARKER M. NIELSON
MARY LOU GODBE

By Parker M. Nielson
Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 1982, I hand-delivered a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Dennis K. Poole, Poole, Cannon & Ward, 4885 South 900 East, Suite 210, Salt Lake City, Utah 84117, attorneys for respondent.

Linda Heidenreich